Filed 3/20/12 In re David M. CA2/7

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re DAVID M., a Person Coming Under the Juvenile Court Law.	B229463 (Los Angeles County Super. Ct. No. MJ19859)
THE PEOPLE, Plaintiff and Respondent, v. DAVID M., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, Robin R. Kesler, Juvenile Court Referee. Affirmed as modified.

Mary Bernstein, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, James William Bilderback II, and Alene M. Games, Deputy Attorneys General, for Plaintiff and Respondent.

David M. was declared a ward of the juvenile court and committed to the care, custody and control of the Los Angeles County Probation Department for placement in a short-term youth camp after the court sustained a petition alleging he had committed two counts of aggravated assault. On appeal David contends the juvenile court's findings are not supported by substantial evidence. He also argues one of the aggravated assault counts must be struck as duplicative or, at the very least, stayed pursuant to Penal Code section 654.[1] We modify the findings and disposition order to strike one of the aggravated assault offenses and, in all other respects, affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Petition*

On August 16, 2010 a Welfare and Institutions Code section 602 petition was filed alleging David, then 16 years old, had committed one count of assault with a deadly weapon (§ 245, subd. (a)(1)) (count 1) and one count of assault by means likely to produce great bodily injury (§ 245, subd. (a)(1)) (count 2).[2] David denied the allegations.

2. *The Jurisdiction and Disposition Hearings*

On August 12, 2010 at 5:30 in the evening Pedro G. and his girlfriend, Karen T., were together at the Desert Sands Park in Palmdale. Karen is David's former girlfriend. When David, a member of the Sick and Twisted Krew (STK) criminal street gang, saw Pedro and Karen, he made a call on his cell phone. Then he walked up to Pedro, berated him for not heeding a prior warning to avoid the park and told Pedro he had better leave because David's "homies" were coming. Pedro looked up and saw a group of seven or eight men arriving at the park. David greeted each of the men with a handshake, and then three of the men in the group attacked Pedro by hitting and punching him. David stood behind the three men while they attacked Pedro. David shoved Pedro but did not hit him.

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1 Statutory references are to the Penal Code unless otherwise indicated.

2 Section 245 was amended in 2011 so that the offense of assault by means likely to produce great bodily injury, formerly included in subdivision (a)(1) of section 245 along with the offense of assault with a deadly weapon, is now codified separately in subdivision (a)(4). (See Stats. 2011, ch. 183, § 1.)

During the fight, one of Pedro's attackers (not David) stabbed him three times with a knife in the arm, shoulder and stomach. At the end of the fight, David and the rest of his group fled. Pedro required surgery on his stomach.

David testified in his own defense. According to David, he only approached Pedro and Karen after he had seen a group of men coming into the park who looked like "gangbangers" and "up to no good." Because he knew Pedro was a gang member, he worried Pedro and Karen would get into trouble. David denied he was in a gang. As to his interaction with the attackers, David explained he had approached the group of men after one of them whom he met the day before called out his name. He shook hands with everyone and introduced himself. As he was talking to one of the men, several others left the group to confront Pedro, who was sitting a few feet away. When David saw that a fight had ensued between several of the men and Pedro, he yelled "Stop, stop." At that point, Pedro was able to run away; and the attackers, along with David, scattered in different directions. David denied enlisting anyone to attack Pedro.

The juvenile court found David's version of events not credible. It did not make sense, the court stated, that David would go up to a group of people that were up to "no good" unless he was involved. "I believe he said [his] homies are coming and you know why I think he went up and talked to them and why he left to go to the group? I believe it's because he didn't want to take anyone on one-on-one. He wanted a bigger group to kind of help him beat this kid up. That's the only thing that makes sense here of what went on. . . . He was a part of this fight. While he may not have [done] the stabbing he was an aider and abettor with regards to being a part of the group standing back" while they did the balance of the attack.

The juvenile court sustained both counts of aggravated assault. Following a disposition hearing the court declared David a ward of the court and, subject to certain

terms and conditions of probation, ordered him to a camp community placement program for six months.[3]

DISCUSSION

1. *Substantial Evidence Supports the Court's Jurisdiction Findings That David Aided and Abetted the Aggravated Assault Resulting in the Stabbing*

The same standard governs our review of the sufficiency of evidence in juvenile cases as in adult criminal cases: "[W]e review the whole record to determine whether *any* rational trier of fact could have found the essential elements of the crime or special circumstances beyond a reasonable doubt. [Citation.] The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] 'Conflicts and even testimony [that are] subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]' [Citation.] A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support"' the jury's verdict." (*People v. Zamudio* (2008) 43 Cal.4th 327, 357; see *In re Matthew A.* (2008) 165 Cal.App.4th 537, 540.)

"'An aider and abettor is a person who "acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or

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[3] The trial court calculated David's maximum period of confinement as five years: four years (the upper term) for assault with a deadly weapon (count 1) and a one-year consecutive term (one-third the middle term) for assault by means likely to produce great bodily injury (count 2). Only assault with a deadly weapon (count 1) is a serious felony. (§ 1192.7, subd. (c)(31); *People v. Delgado* (2008) 43 Cal.4th 1059, 1065.)

facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime."'" (*People v. Jurado* (2006) 38 Cal.4th 72, 136; accord, *People v. Prettyman* (1996) 14 Cal.4th 248, 259.) One who aids and abets an offense is guilty as a principal. (§ 31 [defining principal as "[a]ll persons concerned in the commission of a crime . . . whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission"].) "A person who knowingly aids and abets criminal conduct is guilty of not only the intended crime (target offense) but also of any other crime the perpetrator actually commits [(nontarget offense)] that is a natural and probable consequence of the intended crime. The latter question is not whether the aider and abettor *actually* foresaw the additional crime, but whether, judged objectively, it was *reasonably* foreseeable." (*People v. Mendoza* (1998) 18 Cal.4th 1114, 1133; accord, *People v. Medina* (2009) 46 Cal.4th 913, 920.)

David contends that there was insufficient evidence to support the finding he aided and abetted the attack on Pedro. Although he was present at the time of the attack, shook hands with the attackers when they arrived and fled along with them when they left, he argues that does not mean he colluded with them to harm Pedro. In this regard, David offers a variety of innocent explanations for his conduct while ignoring all contrary inferences. However, when the evidence is viewed in the light most favorable to the judgment, as we must on appeal, it is reasonable to infer David orchestrated the assault: After David saw Pedro had disregarded his prior threat to avoid the park, he made a telephone call, warned Pedro his "homies" were coming and then warmly greeted the group of men who promptly attacked Pedro. David stood behind the attackers during the assault, even shoving Pedro at times. The juvenile court was entitled to find David's vastly different explanation of these events "just not believable." On this record, there is ample evidence to support the juvenile court's findings that David aided and abetted the aggravated assault.

2. *The Juvenile Court Improperly Sustained Both Counts of Aggravated Assault for the Same Act*

David contends the juvenile court cannot sustain allegations for both assault with a deadly weapon and assault by means likely to produce great bodily injury for the *same* act. He is correct. Section 245 "defines only one offense, to wit, 'assault upon the person of another with a deadly weapon or instrument or by any means of force likely to produce great bodily injury . . . .' The offense of assault by means of force likely to produce great bodily injury is not an offense separate from . . . the offense of assault with a deadly weapon." (*In re Mosley* (1970) 1 Cal.3d 913, 919, fn. 5; see *People v. Aguilar* (1997) 16 Cal.4th 1023, 1036-1037 [the single offense of aggravated assault may be shown under two theories, "a 'deadly weapon' theory or a 'force likely' theory"]; *People v. Milward* (2011) 52 Cal.4th 580, 585-586 [§ 245 provides different means of committing aggravated assault, not because the Legislature intended to define separate crimes under § 245, but because Legislature has determined certain means of aggravated assault, such as use of a firearm, are worthy of a greater punishment]; see generally *People v. Frank* (1865) 28 Cal. 507, 513 ["[w]here, in defining an offense, a statute enumerates a series of acts, either of which separately, or all together, may constitute the offense, . . . all of them together do no more, and likewise constitute but one and the same offense"].)

The People argue section 954[4] permits a conviction for assault with a deadly weapon and assault by means likely to result in great bodily injury for the same act. In fact, it does

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4 Section 954 provides, "An accusatory pleading may charge two or more different offenses connected together in their commission, or different statements of the same offense or two or more different offenses of the same class of crimes or offenses, under separate counts, and if two or more accusatory pleadings are filed in such cases in the same court, the court may order them to be consolidated. The prosecution is not required to elect between the different offenses or counts set forth in the accusatory pleading, but the defendant may be convicted of any number of the offenses charged, and each offense of which the defendant is convicted must be stated in the verdict or the finding of the court; provided, that the court in which a case is triable, in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately or divided into two or more groups and each of said groups tried separately. . . ."

nothing of the sort. Section 954 merely states that a defendant may suffer multiple convictions for different offenses that arise from the same act or course of conduct. (*People v. Reed* (2006) 38 Cal.4th 1224, 1226-1227.) Because section 245 defines a single offense (see *In re Mosely*, *supra*, 1 Cal.3d at p. 919, fn. 5; *People v. Aguilar*, *supra*, 16 Cal.4th at p. 1036), David can be adjudicated a ward of the court for only one section 245 offense for a single act.

Alternatively, the People contend David was not found responsible for two counts of assault for the *same* act, but rather for two discrete acts of aggravated assault: The first involved the gang fistfight; the second occurred when one of Pedro's attackers stabbed him after Pedro had bitten him in the course of the fight. (Cf. *People v. Johnson* (2007) 150 Cal.App.4th 1467, 1477 [defendant properly convicted of three separate counts of inflicting corporal injury under § 273.5 based upon use of multiple instrumentalities and infliction of multiple injuries; evidence showed defendant hit victim about face and head; choked her; and stabbed her in arm].) Even though the juvenile court made no express finding on this point, we could affirm as a proper implied finding that the men committed two discrete acts of aggravated assault if there were substantial evidence of an extended attack. (See *People v. Racy* (2007) 148 Cal.App.4th 1327, 1336-1337; *People v. Blake* (1998) 68 Cal.App.4th 509, 512.) However, the evidence in this case permits only one conclusion: There was a single, swiftly-executed aggravated assault, albeit one accomplished with different blows and instrumentalities. (See *People v. Oppenheimer* (1909) 156 Cal. 733, 740 ["We think it is manifest that there was but a single assault shown by this evidence, even though two weapons were used. . . . If one unlawfully assails another with his two hands, first striking at him with one hand and immediately thereafter with the other, no one would say there were two offenses."]; *People v. Mitchell* (1940) 40 Cal.App.2d 204, 211 ["[t]here was but one assault, although two blows, one with the fist and one with a bottle were struck"].)

In sum, the court properly sustained allegations that David had committed one count of aggravated battery—assault with a deadly weapon—but erred in sustaining the allegations as to the second count. Accordingly, we strike the findings as to aggravated

assault by means likely to produce great bodily injury (count 2) and reduce David's maximum term of confinement to four years to reflect a single count under section 245, subdivision (a)(1).

DISPOSITION

The findings as to aggravated assault by means likely to inflict great bodily injury (count 2) are stricken and the maximum term of confinement modified to four years to properly reflect a single count under section 245, subdivision (a)(1). As modified, the juvenile court's findings and order are affirmed.

PERLUSS, P. J.

We concur:

WOODS, J.

ZELON J.